

**COURT OF APPEALS
DECISION
DATED AND FILED**

March 5, 2013

Diane M. Fremgen
Clerk of Court of Appeals

NOTICE

This opinion is subject to further editing. If published, the official version will appear in the bound volume of the Official Reports.

A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. See WIS. STAT. § 808.10 and RULE 809.62.

**Appeal No. 2012AP963-CR
STATE OF WISCONSIN**

Cir. Ct. No. 2007CF421

**IN COURT OF APPEALS
DISTRICT III**

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

CURTIS G. MILLER,

DEFENDANT-APPELLANT.

APPEAL from an order of the circuit court for Outagamie County:
MICHAEL W. GAGE, Judge. *Affirmed.*

Before Hoover, P.J., Mangerson, J., and Thomas Cane, Reserve
Judge.

¶1 PER CURIAM. Curtis Miller appeals an order denying his motion for sentence modification or resentencing. He contends the fact that he is not entitled to participate in the Earned Release Program constitutes a new factor

justifying a sentence reduction or, in the alternative, the court sentenced him on false information that he was entitled to participate in the program. We reject these arguments and affirm the order.

¶2 Miller pled guilty to one count of homicide and three counts of causing injury by intoxicated use of a vehicle. After the court imposed concurrent sentences totaling ten years' initial confinement and ten years' extended supervision, the parties discussed whether Miller was eligible for the Challenge Incarceration Program or the Earned Release Program. The court concluded Miller was not eligible for the Challenge Program, but believed he was statutorily eligible to participate in the Earned Release Program. After Miller was transported to the prison, the Department of Corrections informed the court that Miller was not statutorily eligible to participate in the program. Miller then moved for sentence modification or a new sentencing hearing, contending his ineligibility constituted a new factor or a basis for a new sentencing hearing based on the court's mistaken belief that he was eligible. The circuit court denied the motion, concluding that its sentence focused on the gravity of the offenses, the need to protect the public and Miller's character. The court held that it was simply satisfying its statutory obligation when declaring Miller eligible for the Earned Release Program and eligibility was not a factor that determined the length of the sentences.

¶3 A "new factor" justifying sentence modification refers to a fact or set of facts highly relevant to the imposition of a sentence, but not known to the trial judge at the time of original sentencing, either because it was not then in existence or because, although it was in existence, it was unknowingly overlooked by all of the parties. *Rosado v. State*, 70 Wis.2d 280, 288, 234 N.W.2d 69 (1975). Whether a fact or set of facts constitutes a new factor is a question of law that this

court decides without deference to the circuit court. *State v. Franklin*, 148 Wis. 2d 1, 8, 434 N.W.2d 609 (1989).

¶4 Miller has not established that eligibility for the program was highly relevant to the sentences imposed. The discussion of program eligibility occurred after the court imposed the sentences. The court's comments did not indicate that the length of the sentence imposed was based on the assumption that Miller would successfully complete the program. The circuit court did not appear to be certain whether Miller was eligible for the program, but authorized his participation in the program. However, the department maintains final control over whether an inmate is allowed in the program. See *State v. Schladweiler*, 2009 WI App 177, ¶10, 322 Wis. 2d 642, 777 N.W.2d 114. The court's authorization for Miller to participate in the program if the department approved of his participation was not a factor highly relevant to the length of the sentences.

¶5 Miller also argues he is entitled to a new sentencing hearing because the court sentenced him on the basis of false information consisting of Miller's eligibility for the program. When a prisoner contends the sentencing court relied on inaccurate or incomplete information, he or she is entitled to resentencing only if he or she shows the erroneous information actually affected the sentence. *State v. Tiepelman*, 2006 WI 66, ¶2, 291 Wis. 2d 179, 717 N.W.2d 1. Although this court is not required to accept the circuit court's assertion that the erroneous information did not affect the sentence, see *State v. Groth*, 2002 WI App 299, ¶28, 258 Wis. 2d 889, 655 N.W.2d 163, the record supports the circuit court's assertion that eligibility did not affect the sentences. The finding that Miller was statutorily eligible, made after the court imposed the sentences and explained why it imposed the sentences, had no apparent influence on the length of the sentences.

By the Court.—Order affirmed.

This opinion will not be published. See WIS. STAT. RULE
809.23(1)(b)5. (2011-12).

